Supreme Court, U.S.
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No. 98-1098

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

J. HOWARD FLINT, JR.
and
CARLON S. FLINT,

Petitioners,

v.

EVA L. DAVIS,
AS EXECUTRIX OF THE ESTATE OF
IDA L. FLINT
(AND IN OTHER CAPACITIES),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is there a substantial question of Federal law affording basis for review by the Supreme Court of the United States involved in a suit in Virginia state court between private parties over an alleged breach of contract involving testamentary documents wherein no error is assigned with respect to a denial of Federal constitutional rights and no assertions with respect thereto were set up in the pleadings in the court below at the Circuit Court level?

PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari does not accurately list the parties to the proceeding.

The style and caption of the Petition for Writ of Certiorari in this case as filed with the United States Supreme Court lists Carlon S. Flint as a petitioner. However, at the level of the Circuit Court of Loudoun County (Virginia), Carlon S. Flint's legal counsel did not, on his behalf, sign or file a Notice of Appeal with said Court as required by Virginia Supreme Court Rule 5:9(a) and Virginia Code §8.01-271.1. Objection to Carlon S. Flint's status as petitioner is hereby noted.

The style and caption of the Petition for Writ of Certiorari in this case as filed with the United States Supreme Court lists as respondents Eva L. Davis, individually, and in her capacities as Executrix of the Estate of J. Howard Flint and as Co-Trustee of the Flint Revocable Living Trust. However, the Bill of Complaint filed in the Circuit Court of Loudoun County (Virginia) names as Respondent Eva L. Davis only in her capacity as Executrix of the Estate of Ida L. Flint. Objection to the inclusion of Eva L. Davis individually or in any capacity other than Executrix of the Estate of Ida L. Flint is hereby noted. For said reason the term "Respondent" in the singular sense is employed throughout this Brief In Opposition. The proper parties to the case are:

J. Howard Flint, Jr., Petitioner;

Eva L. Davis, Executrix of the Estate of Ida L. Flint, Respondent.

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JURISDICTIONAL STATEMENT

Petitioners seek to invoke the jurisdiction of the Supreme Court of the United States on writ of certiorari pursuant to U.S.C.S. §1257. This statute, set forth below, permits review of the highest court of a State by this Court in three circumstances: (1) Where the validity of Federal law is drawn into question; (2) Where the validity of a State statute is drawn into question on the ground of its repugnance to Federal law or the Constitution; or (3) Where a title, right, privilege, or immunity is specially set up or claimed under the Constitution or Federal law.

None of these circumstances exist in this matter, and this Court does not have jurisdiction over this matter. Although Petitioners now claim that their rights to due process and equal protection under the 14th Amendment to the Constitution have been violated, they did not raise such claims in their pleadings in Circuit Court of Loudoun County (Virginia) or the Supreme Court of Virginia, nor were such claims argued by the parties at any stage, nor are Petitioners specific in their allegations in their instant petition as to how said rights may have been violated in the courts below.

Respondent urges denial of the petition on the basis of lack of jurisdiction of this Court.

STATUTORY JURISDICTIONAL PROVISION AT ISSUE

28 USCS §1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or

statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

A. Procedural Background

The case before the Court on this petition is one of a series of cases waged by Petitioners against Respondent (personally and in fiduciary capacities) initiated in the Circuit Court of Loudoun County (hereinafter the "Circuit Court") with respect to the disposition of the Estate of their father and step-mother J. Howard Flint, Sr., and Ida L. Flint (hereinafter "Mr. Flint" and "Mrs. Flint", respectively) and a series of testamentary documents which Mr. and Mrs. Flint had executed, to wit: Flint Revocable Trust u/t/d June 4, 1988 (hereinafter the "Trust") and wills of the same date. The issue before the Circuit Court, and subsequently before the Virginia Supreme Court on appeal, was whether the rulings on the first case (Loudoun County Chancery No. 15055, Virginia Supreme Court Record No. 962224)[1] raised a bar of prior adjudication to the second (instant) case. The Circuit Court ruled that the issues presented in the instant matter were raised or could have been raised in the first case and were thereby barred from further adjudication.

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[1] This case shall hereinafter be referenced as "Chancery No. 15055" or "the first case."

Petitioners initiated Chancery No. 15055 in 1993 prior to Mrs. Flint's death. She died in 1994 during the course of the litigation and Respondent was substituted as a party in her capacity as Executrix of Mrs. Flint's estate. The primary issue of that case centered on the question of whether Mrs. Flint, as Settlor, retained the right to revoke and amend her share of the Trust (consisting of assets which she contributed and received from her husband) and/or to request disbursement of its principal subsequent to the death of Mr. Flint who had died in 1988. Petitioners had been named beneficiaries of a portion of Mrs. Flint's trust share at one point in time. Upon Mrs. Flint's death, the focus of the primary issue then shifted slightly to encompass the efficacy of trust amendments and a disbursement directive she had executed during her life, the combined effect of which had removed Petitioners as beneficiaries. The Circuit Court correctly ruled that Mrs. Flint had, in fact, retained the right to revoke and amend her share of the Trust, thereby giving effect to the amendments which she had executed during her life. Petitioners' interest under the Trust was litigated and determined in said first case to the effect that they had no interest in Mrs. Flint's share of the Trust. Petitioners filed a Petition for Appeal of the Circuit Court's rulings in that matter, and the Virginia Supreme Court refused said petition on May 29, 1997.

A few weeks later, on July 3, 1997, Petitioners filed the instant matter, asserting that Mr. and Mrs. Flint had entered into a "testamentary compact" which included the Trust, "pour over" wills executed by Mr. and Mrs. Flint on June 4, 1988, and a deed of the same date whereby certain real property was transferred to the Trust. Petitioners asserted that Mrs. Flint breached the "testamentary compact" (1) by requesting (and

receiving) principal distribution from her share of the Trust which the court, in the first case, held she was authorized to execute, (2) by executing the amendments to her share of Trust which the court, in the first case, held she was authorized to execute, and (3) by making a new will in February, 1994 (see Amended Bill of Complaint ¶ 11).

In the Circuit Court, Respondent filed a plea in bar, asserting that the Petitioners' new action was barred by prior adjudication of any and all relevant issues in Loudoun County Chancery No. 15055 and/or an *inter parties* probate matter (Loudoun County Chancery No. 15886) initiated by Respondent pursuant to Virginia Code §64.1-79 to which Petitioners and Respondent had been parties. All of the documents said to comprise the "testamentary compact," as well as the trust amendments and the February, 1994 will, were admitted into evidence in Chancery No. 15055. The instant case deals with the same subject matter as that case, to wit: the disposition of property owned by Mr. and Mrs. Flint upon their deaths. Relevant portions of the records from Chancery Nos. 15055 and 15886 were certified into the instant case. The Circuit Court sustained the plea in bar and dismissed the cause with prejudice. The Virginia Supreme Court refused Petitioners' petition for appeal and a petition for rehearing without opinion.[2]

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[2] As noted in the "Parties to the Proceeding" section of this Brief in Opposition, Carlon S. Flint's legal counsel did not, on his behalf, sign or file a Notice of Appeal with the Circuit Court as required by Virginia Supreme Court Rule 5:9(a) and Virginia Code §8.01-271.1. The Virginia Supreme Court denied the Petition for Appeal without comment as to his status as purported Appellant.

At no point in the pleadings at the Circuit Court level did Petitioners assert that they had been denied due process or equal protection under the Fourteenth Amendment to the United States Constitution (as applied through the Fifth Amendment), nor was such an assertion made in their petition for appeal to the Virginia Supreme Court. Having not been pled, it was never argued by the parties or considered by either level of Virginia court.

B. Statement Of Facts[3]

On June 4, 1988, Mr. and Mrs. Flint, husband and wife for over 40 years, established the Trust, designating Mrs. Flint and Eva L. Davis as Trustees. On that date, Mr. and Mrs. Flint funded the Trust by executing a deed transferring to the Trust their jointly owned 338 acre farm, consisting of four (4) parcels, near Round Hill, Virginia. Mr. and Mrs. Flint also executed "pour over" wills on the same date. Petitioners contend that, in signing these documents, Mr. and Mrs. Flint entered a "testamentary compact."

J. Howard Flint died on December 12, 1988, and his 1988 will was duly probated in the Circuit Court of Loudoun County on March 29, 1989. Pursuant to Trust Article 3B, the assets in Mr. Flint's share of the Trust were distributed fully subsequent to his death. After determining that Mr. Flint's share did not require additional funding under Article 3B2, the Trustees

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[3]The "Statement of Facts" section of Petitioners' Petition (pp. 3-5) is inaccurate, incomplete, misleading, unsupported by the record in the case, and contains a multitude of erroneous conclusions of law. Accordingly, in furtherance of their obligations under Rule 15.2 of the Supreme Court Rules, Respondent is compelled to correct the misstatements of the record.

were directed to follow Article 3B3 by allocating assets to a "by-pass trust" (also known as "Trust B") in an amount equal to his unified tax credit equivalent ($600,-000).[4] Mrs. Flint had the right to receive the income from Trust B, as well as certain rights to access principal, but she had no right to revoke or amend Trust B. The remainder of Mr. Flint's share was allocated and added to Mrs. Flint's share pursuant to Article 3B4. This survivor's share, consisting both of what she contributed and what was added from Mr. Flint's share, became known as Trust A. Loudoun County Chancery No. 15055 confirmed that Mrs. Flint retained the right to revoke and amend Trust A and to request and receive full principal distribution therefrom.

As executed originally in 1988, Article 3C2 of the Trust provided a scheme of distribution whereby, upon the death of the second Settlor to die, the assets of both Trust B and Trust A (the survivor's share) would include distributions to various family members, including Petitioners for 25% each. In years subsequent to Mr. Flint's death, Mrs. Flint contributed additional assets to the corpus of Trust A and executed a series of Trust amendments modifying various provisions of Trust A. The amendments which she executed altered the scheme for distribution of Trust A assets at her death, in the course of which the distributions to Petitioners were eliminated. The Trust amendment which was in effect at the time of her death in August 1994 was the Sixth Amendment to Trust Agreement dated February 17, 1994. This amendment allocated distribution of Trust A's assets to her Executrix upon Mrs. Flint's death. Also

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[4]The funding of Trust B was resolved in an evidentiary hearing in Chancery 15055. That portion of the case was not part of the matter appealed in Supreme Court Record No. 962224.

on February 17, 1994, Ida Flint executed a directive to herself and Eva L. Davis as Trustees whereby she instructed that all assets in Trust A be distributed to her immediately.

When Mrs. Flint died on August 3, 1994, the will which she had in effect was dated February 17, 1994. It provided for a distribution scheme which did not include Petitioners as beneficiaries. Eva L. Davis, named Executrix under said will, petitioned the Circuit Court of Loudoun County in Chancery No. 15886, to issue a summons pursuant to Virginia Code §64.1-79 to Petitioners and others to appear before the Court on October 28, 1994, to show cause, if they could, why Mrs. Flint's will of February 17, 1994, should not be probated. Petitioners, by counsel, entered an appearance and filed objections to the probate of Mrs. Flint's will. They eventually withdrew their objections of record, and the will was admitted to probate.

In the meantime, in May, 1993 (prior to Mrs. Flint's death), Petitioners filed Chancery No. 15055 which initially covered a variety of actions, including a challenge to the Trust and their father's will. Ida Flint died during the course of the litigation, her estate was added as a party, a countersuit was brought, and additional issues were added. The primary issue in that case eventually centered on whether the surviving Settlor of the Trust retained powers of revocation and amendment after the death of the first Settlor with respect to Trust A as identified thereunder. A series of rulings in 1996 construed and interpreted the Trust and upheld Ida L. Flint's right to revoke and amend Trust A of the Trust subsequent to Mr. Flint's death, thereby giving effect to the series of amendments referenced above. Petitioners appealed to the Virginia Supreme Court that portion of

Chancery No. 15055 which upheld the validity of Ida L. Flint's right to revoke and amend Trust A. The Supreme Court denied the Petition for Appeal on May 29, 1997 (Supreme Court Record No. 962224). They filed the instant matter on July 3, 1997, based on the foregoing facts which already had been considered in Chancery No. 15055.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI WHEN NO ERROR RELATING TO FEDERAL CONSTITUTIONAL ISSUES IS ASSIGNED, NOR WHERE SUCH CLAIMS WERE RAISED BY PETITIONERS OR CONSIDERED BY THE COURTS BELOW.

Petitioners assert that this Court has jurisdiction to entertain their writ pursuant to 28 USCS §1257 set forth above. However, Petitioners' Assignment of Errors are not based on any federal Constitutional or statutory claim in the Virginia courts. Allusions in the text of the Petition to possible violation of their equal protection and due process rights in the Courts below is a new argument and appears, at best, to be incidental to the Assignments of Error relating to the Virginia courts' rulings concerning prior adjudication. Federal Constitutional claims were not advanced in the Bill of Complaint, Amended Bill of Complaint, Response (or Supplement) to Demurrer or Plea in Bar, or Memorandum of Points and Authorities Re: Demurrer and Plea in Bar. They were not made in oral arguments on the Plea in Bar. The only vague reference of such claims in the record of this case at the Circuit Court level is found at the end of a hand-written statement at the end of Petitioners' objections to the entry of that court's final decree (p. 4a),

and the grounds for its assertion are unknown. The point having not been raised, the Circuit Court did not address federal claims.

Petitioners' Petition for Appeal to the Supreme Court of Virginia does not cite, and is in no way based on, any claim of denial of federal equal protection and due process rights as set forth in the U.S. Constitution. Thus, consideration of those rights was never before that court. In the concluding paragraphs of their Petition for Reconsideration of Petition for Appeal, Petitioners recite that their due process and equal protection rights were violated, but there is no reference to indicate that they are not alluding to due process rights accorded under the Constitution of the Commonwealth of Virginia at Article I, §11 thereof. In *Bowe v. Scott,* 233 US 658, 58 L.Ed. 1141, 34 S.Ct. 769 (1914), this Court dismissed a similar appeal from the Virginia Supreme Court for want of jurisdiction under practically identical circumstances, noting the existence of the Virginia Constitution's due process clause.

If federal issues were "not pressed or passed on" in the state courts, jurisdiction to entertain such issues for the first time will not lie or writ to the Supreme Court. See *Cardinale v. Louisiana,* 394 US 437, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969); *Illinois v. Gates,* 462 US 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983). *Yee v. City of Escondido,* 503 US 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992). This long-standing rule of jurisprudence has its roots in predecessor statutes to 28 USCS §1257 and our system of federalism as outlined in *Owings v. Norwood's Lessee,* 5 Cranch 344, 3 L.Ed. 120 (1809), and *Crowell v. Randell,* 10 Peters 368, 9 L.Ed. 458 (1836). The right to bring a matter from the state court is preserved only if the federal issue is set up and

claimed below. "It is settled that this court, on error to a state court, cannot consider alleged Federal question when it appears that the Federal right thus relied upon had not been, by adequate specification, called to the attention of the state court, and had not been by it considered, not being necessarily involved in the determination of the cause." *Harding v. Illinois,* 196 U.S. 78, ___ , 49 L.Ed. 394, ___ , 25 S.Ct. 176, 178 (1904).

Further, this Court does not have jurisdiction to grant a writ of certiorari where there is no substance or color of merit to any substantial question of federal Constitution claim. The mere fact that a party asserts title under a clause of the Constitution is not in itself sufficient, unless there be at least a plausible foundation for such claim. "A party may assert a right, title, privilege, or immunity without even color for such assertion, and if that were alone sufficient to give this court jurisdiction, a vast number of cases might be brought here simply for delay or speculative advantage." *Iowa v. Rood,* 187 US 87, ___ , 47 L.Ed. 86 ___ , 23 S.Ct. 49, 51 (1902). "A real, and not a fictitious, Federal question is essential to the jurisdiction of this court of the judgments of state courts." *Sawyer v. Piper,* 189 US 154, ___ , 47 L.Ed. 757, ___ , 23 S.Ct. 633, 634 (1903).

II.

THE APPLICATION OF THE JUDICIAL DOCTRINE OF PRIOR ADJUDICATION IN THIS CASE IS WHOLLY A MATTER OF VIRGINIA LAW WHICH THE COURTS BELOW CORRECTLY CONSIDERED AND APPLIED.

The Virginia Courts considered only the application of Virginia law to this matter. In so doing, they correctly applied the doctrine of prior adjudication, a concept present in all orderly jurisprudence, including federal law.

The instant case and Chancery No. 15055 are, in their essences, the same case, a fact dramatically demonstrated by noting that the petition for appeal to the Virginia Supreme Court in the instant case lifts its "question presented" (Petition for Appeal page *v*) *verbatim* from the same "question presented (no. 2, page *vii*) in Petitioner's petition for appeal in Virginia Supreme Court Record No. 962224. Further, as identified in Respondent's Brief in Opposition filed with the Virginia Supreme Court, significant portions of the text of the Petition for Appeal were adopted *verbatim* from the Petition for Appeal in the previous matter.

Petitioners and Respondent were among the parties in Chancery No. 15055. All of the documents (Trust, wills, deeds) relevant to this case were admitted and considered in Chancery No. 15055. Mrs. Flint's actions which Petitioners complained of in Chancery No. 15055 are the very same actions of which they complain now. The relief Petitioners sought in Chancery No. 15055 is the very same relief which they seek now. The claim that, by exercising said rights affirmed in Chancery No. 15055, Mrs. Flint breached a testamentary contract was raised or could have been raised in said matter and is thereafter barred under the doctrine of prior adjudication. In point of fact, Petitioners endeavored belatedly to raise this theory of claim in Chancery No. 15055. Respondent replied that the matter had not been well pled or properly raised.

The doctrine of prior adjudication (in Virginia and under federal law) is grounded in public policy considerations. "It 'proceeds upon the principle that one person shall not the second time litigate, with the same person . . . the same legal right, precisely the same question, particular controversy, or issue, which has been

necessarily tried and finally determined, upon the merits, by a court of competent jurisdiction, in a judgment *in personam* in a former suit.' " *Ward v. Charlton,* 177 VA 101, 115, 12 S.E.2d 791, ___ (1941), quoting from *United States v. California Bridge & Construction Co.,* 245 U.S. 337, 341, 38 S.Ct. 91, 93, 62 L.Ed. 332. The reasoning behind the public policy was most eloquently stated by the Virginia Supreme Court in *Griffin v. Griffin,* 183 VA 443, 32 S.E.2d 700 (1945):

> "The doctrine of res judicata may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice, and public tranquility. Public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of res judicata, would be endless. The doctrine of res judicata rests upon the ground that the party . . . has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction and should not be permitted to litigate it again to the harassment and vexation of his opponent. The doctrine of res judicata not only puts an end to strife but produces certainty as to individual rights and gives dignity and respect to judicial proceedings." *Griffin v. Griffin,* 183 VA 443, 452, 32 S.E.2d 700, ___ (1945)

The same Circuit Court judge presided over both cases and correctly recollected his consideration of the issues and documents, and the effect of its rulings, in Chancery No. 15055. The Circuit Court was very much aware that it could not hold in a subsequent case that Mrs. Flint's actual exercise of the rights it had upheld in the first case violated Petitioners' rights under the very same documents it had construed previously. The Circuit Court had construed the testamentary documents on

their merits in Chancery No. 15055. Petitioners merely seek to place another construction to them which would have the effect of overturning the court's construction in the prior case.

Petitioners' new construction seeks to employ Virginia's law regarding reciprocal will contracts as set forth in *Williams v. Williams*, 123 VA 643, 96 S.E. 749 (1918). As the court below pointed out, the *Williams* case did not in any way deal with a revocable trust or with pour over wills to a revocable trust (Transcript of January 9, 1998, pp. 29-31). Moreover, this doctrine is inapplicable because the wills are not reciprocal and there was no contract between Mr. and Mrs. Flint to leave their property to any given individuals. In the Circuit Court, Respondent raised this matter by filing a demurrer which said Court did not reach because of its disposition of the case on the plea in bar. Even if the Circuit Court had not found the doctrine of prior adjudication to be applicable, the case could have been decided for Respondent on demurrer.[5] [6]

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[5]Mr. Flint's will at article I(B) left his residuary estate to the Trustees of the Trust "to be held in trust under the terms in effect at my death" (emphasis added). Mrs. Flint's will at Article I(B) left her residuary estate to the Trustees of the Trust "to be held in trust under the terms in effect at my death" (emphasis added). By definition and as confirmed by the construction given in Chancery No. 15055, the Trust was not a static document. Its terms were subject to revocation and amendment (Trust Article 1(A)), even by the surviving Settlor after the death of the first to die. Thus, the wills contemplated and anticipated that Trust changes might take place such that Trust terms as cross-referenced by the wills would not necessarily be the same at any

[footnote continued]

[6]Appellee raised other points on demurrer such as (1) Petitioners' lack of standing because their interests (if any) were in

[footnote continued]

The terms of the documents said to comprise the "contract" are testamentary in nature, and there is nothing therein which suggests that the documents constitute a "compact" or contract disguised under the name and appearance of testamentary documents. In Virginia, testamentary documents in their nature are ambulatory or revocable, not intended or allowed to take effect until the death of the maker. See *Timberlake v. State-Planters Bank*, 201 VA 950, 115 S.E.2d 39 (1960). Mr. and Mrs. Flint's documents, Trust and wills alike, go to great lengths to confirm this inherent quality.

[footnote 5 continued]

given time and could be different on Mr. and Mrs. Flint's respective dates of death. The wills envisioned the possibility that their respective beneficiaries (the Trust at different given points in time) would be different. The documents envisioned that the wills each would speak at the respective deaths of the testators, not at the death of the first to die only. This explicitly confirmed the statutory and axiomatic rule of construction that a will speaks at the death of the testator. See Virginia Code §64.1-62 applied in *Yates v. Scales*, 244 VA 300, 421 S.E.2d 195 (1992).

[footnote 6 continued]

Trust; and (2) failure to name as party to the suit an indispensable party, to wit: the Trustee.

CONCLUSION

Based on the foregoing arguments and authorities, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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